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Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

October Term, 1972

72-459

Nos. 459, 620

72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. Carl KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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NOTICE OF APPEAL (DIAZ ET AL.) FILED AUGUST 8, 1972

NOTICE OF APPEAL (SLOAN) FILED AUGUST 14, 1972

NOTICE OF APPEAL (CROUTER) FILED AUGUST 21, 1972

PROBABLE JURISDICTION NOTED JANUARY 22, 1973

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972
Nos. 459, 620

GRACE SLOAN as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER,

Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 13, 1971, Complaint filed.

November 12, 1971, Defendant Sloan's Motion To Dismiss the Second and Third Counts of the Complaint for Failure of Plaintiffs To Have Standing To Sue Thereunder filed.

November 12, 1971, Defendant Sloan's Motion To Dismiss Plaintiffs' Complaint for Failure To State a Claim on Which Relief Can Be Granted filed.

December 21, 1971, Motion of Henry E. Crouter To Intervene as Party Defendant filed.

December 27, 1971, Order Granting Motion of Henry E. Crouter To Intervene as Party Defendant filed.

December 28, 1971, Motion of Jose Diaz et al. To Intervene as Parties Defendant filed.

January 4, 1972, Motion of Defendant Crouter, Under Federal Rules of Civil Procedure 12, To Strike Paragraph 10 of Plaintiffs' Complaint and To Dismiss the Complaint filed.

January 20, 1972, Order Granting Motion of Jose Diaz et al., To Intervene as Parties Defendant filed.

January 27, 1972, Motion of Jose Diaz et al., To Dismiss Plaintiffs' Complaint for Failure To State a Claim Upon Which Relief Can Be Granted filed.

January 27, 1972, Motion of Jose Diaz et al., To Dismiss the Second and Third Counts of the Complaint for Failure of Plaintiffs To Have Standing To Sue Thereunder filed.

April 6, 1972, Opinion and Order Denying Defendants' Motions To Dismiss the Complaint filed.

April 28, 1972, Order Granting Motions of Defendants To Dismiss Counts 2 and 3 of the Plaintiffs' Complaint filed.

May 1, 1972, Answer of Defendant Sloan to Plaintiffs' Complaint filed.

May 1, 1972, Answer of Jose Diaz et al., to Plaintiffs' Complaint filed.

May 1, 1972, Answer of Defendant Crouter to Plaintiffs' Complaint filed.

May 3, 1972, Motion of Intervener Defendants Seth W. Watson, Jr., and Anne P. Watson for Summary Judgment and Affidavit filed.

May 3, 1972, Plaintiffs' Motion for Summary Judgment filed.

May 11, 1972, Affidavit of Neal F. Bracken filed.

June 21, 1972, Order Denying Motion of Intervenors Seth W. Watson, Jr. and Ann P. Watson for Summary Judgment and Limiting Arguments to Certain Issues filed.

July 13, 1972, Parent Application Form, Pennsylvania Parent Assistance Authority filed.

July 21, 1972, Order Granting Plaintiffs' Motion for Summary Judgment filed.

July 31, 1972, Motion of Defendant Crouter To Alter or Amend the Judgment Under Rule 59(e) filed.

August 1, 1972, Motion of José Diaz et al., for Amended Order filed.

August 3, 1972, Order Denying Motion of Defendant Crouter To Alter or Amend the Judgment Under Rule 59(e) filed.

August 4, 1972, Order Denying Motion of Jose Diaz et al., for Amended Order filed.

January 22, 1973, Order Noting Probable Jurisdiction and Consolidating Cases filed.

COMPLAINT

(Title Omitted in Printing)

I. STATEMENT AS TO JURISDICTION

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1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the Commonwealth of Pennsylvania to support and finance in whole or in part the operations of and instruction in a) private schools owned and controlled by religious organizations and organized for and engaged in the practice, propagation and teaching of particular religions, and b) private schools whose policies and practices, by purpose or effect, exclude or restrict admission by reason of race or religion; and to declare such use violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S.C., Sections 1331, 1343(3), 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000) Dollars, as more fully appears hereinafter.

4. Each of the plaintiffs is a citizen, resident and taxpayer in the United States and in the Commonwealth of Pennsylvania, and resides in the Eastern District of Pennsylvania. Each has purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

5. Plaintiff Alton Lemon is a parent of a Negro child attending a public school in Pennsylvania and sues in his own behalf and on behalf of others similarly situated.

6. It is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power to contribute to the propagation of religion or for the support of sectarian schools or of other schools which by purpose or effect exclude or restrict admission on the basis of race or religion.

7. Defendant Grace Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued in that capacity.

II. FACTUAL ALLEGATIONS

8. On August 27, 1971, the Governor of the Commonwealth of Pennsylvania signed into law Act 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reimbursement Act for Nonpublic Education," hereinafter referred to as the Act. (The text

of the Act is set forth herein as Appendix A from House Bill 1379, Printer's No. 1779.) The Act appropriates 23% of the Pennsylvania Cigarette Tax revenues for reimbursement of tuition payments to parents of children attending nonpublic elementary schools in the amount of seventy-five dollars ($75) per year per child and to parents of children attending nonpublic secondary schools in the amount of one hundred and fifty dollars ($150) per year per child.

9. The Pennsylvania Cigarette Tax revenues are the sole property of the Commonwealth of Pennsylvania.

10. The Act on its face and as construed and applied by the defendant authorizes and directs payment for the tuition of students in educational institutions which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach.

11. The Act on its face and as construed and applied by the defendant authorizes and directs pay-

ments for the tuition of students in educational institutions which by purpose or effect segregate students by race, thereby perpetuating and promoting the segregation of races and two separate school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior.

12. Unless enjoined by this Court, the defendant will pay all or part of the sums appropriated by the Act for the payment of tuition at the aforesaid nonpublic schools and will in the future continue to pay large sums in effectuation of the purposes of the Act.

III. CAUSES OF ACTION

13. *First Count:* The Act on its face and as construed and applied by the defendant is a law respecting an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States in that it (a) finances religious instruction and worship; (b) has as its purpose the advancement of religion; (c) has as its primary effect the advancement of religion; (d) gives rise to excessive governmental involvement in and entanglement with religion; (e) gives rise to and intensifies political fragmentation and divisiveness on religious lines, and (f) prefers and strengthens those religions and sects which choose to or can afford to

operate a parochial system of education over those which do not or cannot.

14. *Second Count:* The Act on its face and as construed and applied by the defendant does and will prohibit the free exercise of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States in that it (a) constitutes compulsory taxation for the support of religion, and (b) discriminates against and weakens those religions and sects which do not choose to or cannot afford to operate a parochial system of education in relation to those which do operate such schools.

15. *Third Count:* The Act on its face and as construed and applied by the defendant violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it perpetuates and promotes the segregation of races.

IV. OTHER ALLEGATIONS

---

16. This suit involves a genuine case or controversy between the plaintiffs and the defendant.

17. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

V. PRAYERS FOR RELIEF

18. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare unconstitutional and enjoin the enforcement of the Pennsylvania Parent Reimbursement Act for Nonpublic Education as hereinbefore set forth.

(2) That the defendant be enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to the Act or otherwise, directly, or by way of reimbursement, for tuition at schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance of students at instruction in theology or religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, (10) impose religious restrictions on what the faculty may teach, or (11) by purpose or effect, segregate students by race.

(3) That a preliminary injunction pending the trial of the issues be granted against the defendant for the relief sought herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

September , 1971

Mann and Ungar
By: Theodore R. Mann
1845 Walnut Street
Philadelphia, Pa. 19103
Leo Pfeffer
15 East 84th Street
New York, N. Y. 10028
Attorneys for Plaintiffs

COMPLAINT—APPENDIX A

[Appendix A is the text of the Act herein challenged. It is found as Appendix A to the Opinion and Order Denying Defendants' Motions To Dismiss the Complaint.]

DEFENDANT'S MOTION TO DISMISS THE SECOND AND THIRD COUNTS OF THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE THEREUNDER

(Title Omitted in Printing)

The Defendant respectfully moves the Court to dismiss the Second and Third Counts of the Plaintiffs' Complaint on the ground that Plaintiffs do not have standing to sue thereunder.

In support thereof, Defendant assigns the following reasons:

I.

Second Count

---

1. The Complaint fails to allege facts sufficient to show that any of the Plaintiffs have religious beliefs, what such beliefs are, and to what extent, if any, Act 92 interferes with the free exercise of any religious belief of any Plaintiff or with any religious practice which he may have.

II.

Third Count

---

2. The issue of Plaintiff's standing to sue under the Equal Protection Clause is res judicata by virtue

of the decision of this Court in Lemon v. Kurtzman, 310 F. Supp. 35, 43 (1969), in which the Plaintiff herein, Alton J. Lemon, was a party plaintiff and in which the Defendant herein, Grace Sloan, was a party defendant.

3. In the alternative: (a) the Complaint fails to allege facts sufficient to show that any individual Plaintiff suffers, or is threatened by, any discrimination; (b) the Complaint fails to allege facts sufficient to show that Plaintiff Alton J. Lemon has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue either on his own behalf or on behalf of all other persons similarly situated.

WHEREFORE, the Defendant respectfully prays the Court to enter an Order dismissing counts Second and Third of the Plaintiffs' Complaint.

Respectfully submitted,

J. Justin Blewitt, Jr.
Deputy Attorney General

J. Shane Creamer
Attorney General

Attorneys for Defendant

State Capitol
Harrisburg, Pa.

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(Title Omitted in Printing)

Defendant respectfully moves the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendant's favor. In support thereof, Defendant assigns the following reasons:

I.

First Count

Paragraph 13—Establishment of Religion

1. The bare conclusory allegations, "(a)", "(b)", "(c)", "(d)", "(e)", and "(f)", that the Act is unconstitutional on its face and as applied, fail to state any claim since the Act has solely the public and secular legislative purpose and effect of providing financial assistance to parents in the educating of their children in compliance with the compulsory school attendance requirements of law.

2. The Complaint fails to allege any facts sufficient to show that the Establishment Clause allegations are ripe for decision.

II.

Second Count

Paragraph 14—Free Exercise

3. The allegation, "(a)", that the Act is unconstitutional on its face and as applied because it "con-

stitutes compulsory taxation for the support of religion" is insufficient as a matter of law, in that the Act achieves solely the public and secular legislative purpose of providing financial assistance to parents and does not require or permit support of religion.

4. The Complaint fails to allege facts sufficient to show that the Act in any way "discriminates against or weakens" any religion or sect.

5. The Complaint fails to show that the Free Exercise allegations are ripe for decision.

III.

Third Count

Paragraph 15—Equal Protection of the Laws

6. The Complaint fails to allege that the Act on its face or as applied, either expressly or by implication, requires, permits or results in any discriminatory State action.

7. The Complaint fails to allege, either expressly, or by implication, that the Act requires or permits invidious classification or discrimination of any kind based upon race.

8. The allegation of the Complaint that the Act authorizes payments for the tuition of students in educational institutions which by purpose or effect segregate students by race fails to constitute an allegation of a denial of the equal protection of the laws.

9. The Complaint fails to allege facts sufficient to show that the Equal Protection claim is ripe for decision.

WHEREFORE, the Defendant respectfully prays the Court to enter an Order dismissing Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and to enter a Judgment of Dismissal in Defendant's favor.

Respectfully submitted,

J. Justin Blewitt, Jr.
Deputy Attorney General

J. Shane Creamer
Attorney General

Attorneys for Defendant

State Capitol
Harrisburg, Pa.

MOTION OF HENRY E. CROUTER TO INTERVENE AS PARTY DEFENDANT

(Title Omitted in Printing)

Henry E. Crouter, by his attorneys, Duane, Morris & Heckscher, moves for leave to intervene as a defendant in the above action and in support thereof, assigns the following reasons:

1. Petitioner is a resident of the Commonwealth of Pennsylvania and a parent of three children who are residents of the Commonwealth of Pennsylvania. Two of Petitioner's children are enrolled as students in Springside School, Philadelphia, Pennsylvania, and the third child is enrolled as a student in Chestnut Hill Academy, Philadelphia, Pennsylvania. Springside School and Chestnut Hill Academy are each nonpublic independent schools, each qualifies as a school within the Commonwealth of Pennsylvania in which a resident of the Commonwealth may fulfill the compulsory school attendance requirements, and each meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law, 88-352).

2. Petitioner is a parent within the meaning of §3(1) of the Act, and as such, is eligible for tuition reimbursement payments under the Act.

3. Petitioner intends to apply for reimbursement payments pursuant to the Act, at the time prescribed in the Act.

4. Plaintiffs' Complaint alleges that the Act is unconstitutional both on its face and as applied and seeks to have the Act declared unconstitutional and to enjoin the payment of any monies to parents of students enrolled in nonpublic schools under the Act.

5. Petitioner has an interest relating to the property which is the subject matter of this action and is so situated that the disposition of the action will, as a practical matter, impair or impede his ability to protect such interests unless petitioner is granted leave to intervene.

6. Petitioner has, or may have, defenses to plaintiffs' claims which present both questions of law and of fact which are common to the above action.

7. As a parent eligible for reimbursement under the Act, and as a parent of children attending nonpublic, independent schools in the Commonwealth, petitioner has claims and defenses separate and distinct from those of the sole party defendant, the Treasurer of the Commonwealth of Pennsylvania. There is presently no party of record who can adequately assert the parental rights, claims and defenses of petitioner. Unless petitioner is allowed to intervene, his rights will be disposed of without adequate representation.

8. Granting the within Petition will not delay or prejudice the adjudication of the rights of any original party.

9. Petitioner is authorized to state that the defendant has no objection to the Motion To Intervene.

Henry T. Reath
Robert L. Pratter

for Duane, Morris & Heckscher
Attorneys for Petitioner

ORDER

(Title Omitted in Printing)

AND NOW, this 27th day of December, 1971, the Court hereby grants the Motion of Henry E. Crouter To Intervene as a Party Defendant and directs that he file a responsive pleading to the Complaint in this action within ten days from the date of this Order.

Joseph S. Lord, III,
J.

MOTION OF JOSE DIAZ, ET AL. TO INTERVENE AS PARTIES DEFENDANT

(Title Omitted in Printing)

Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife, F. Carl Kretzmann and Katheryn L. Kretzmann, his wife, Arthur Harvey and Muriel Harvey, his wife, Daniel F. X. Powell and Anna T. Powell, his wife, and Seth W. Watson, Jr. and Anne P. Watson, his wife, hereinafter collectively designated the "Interveners", by their attorneys, respectfully move this Court pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, for permission to intervene as parties defendant in this action. In support thereof, the Interveners assign the following reasons:

1. Each of the Interveners is a taxpayer and a citizen of the United States of America and a resident of the Commonwealth of Pennsylvania, living in the Eastern District of Pennsylvania.

2. Each of the Interveners is a taxpayer and citizen of the Commonwealth of Pennsylvania.

3. Each of the Interveners is a "parent" of one or more "students" who are enrolled in "nonpublic schools," as those terms are defined in Act 92 of August 27, 1971 (hereinafter designated the "Act"), the constitutionality of which is being challenged in this action.

4. Jose Diaz and Enilda Diaz, his wife, reside at 2539 North Second Street, Philadelphia, Pennsylvania. They are the parents of Dalila Diaz, age 12, Jose Diaz, Jr., age 8, and Sergio Diaz, age 7, all of whom are students currently enrolled in a nonpublic school. Jose Diaz is employed as a shipping clerk; Enilda Diaz has part-time employment. Jose and Enilda Diaz are the sole support of their family, which consists of eight persons (Mr. and Mrs. Diaz, five minor children and the mother of Enilda Diaz). They contribute monthly to the support of Mr. Diaz' parents, who reside in Puerto Rico.

5. William Zimmerspitz and Nancy Zimmerspitz, his wife, reside at 937 East Dorset Street, Philadelphia, Pennsylvania. They are the parents of Rochelle Zimmerspitz, age 13, who is enrolled in a nonpublic school. Mr. Zimmerspitz is self-employed in South Philadelphia. He is the sole support of his family, which consists of four persons (Mr. and Mrs. Zimmerspitz and two minor children).

6. F. Carl Kretzmann and Katheryn L. Kretzmann, his wife, reside at 3110 Ryan Avenue, Philadelphia, Pennsylvania. They are the parents of Deborah L. Kretzmann, age 13, who is a student enrolled in a nonpublic school. Mr. Kretzmann is employed as a principal and school teacher; Mrs. Kretzmann is employed as a secretary. F. Carl and Katheryn Kretzmann are the sole support of their family, which includes five minor children.

7. Arthur Harvey and Muriel Harvey, his wife, reside at 1226 N. Allison Street, Philadelphia, Penn-

sylvania. They are the parents of Craig Byron Chester, age 13, who is a student enrolled in a nonpublic school. Mr. Harvey is employed as a clerk in the United States Postal Service. He is the sole support of his family, which consists of three persons (Mr. and Mrs. Harvey and their son).

8. Daniel F. X. Powell and Anna T. Powell, his wife, reside at 7933 Williams Avenue, Philadelphia, Pennsylvania. They are the parents of Marianne T. Powell, age 12, Kathleen A. Powell, age 9 and Daniel F. X. Powell, Jr., age 8, all of whom are enrolled in a nonpublic school. Mr. Powell is employed by Allstate Insurance Company, and is the sole support of his family, which consists of six persons (Mr. and Mrs. Powell and four minor children).

9. Seth W. Watson, Jr. and Anne P. Watson, his wife, reside at 246 Kent Road, Wynnewood, Pennsylvania. They are the parents of Seth W. Watson, III, age 15, Ellen P. Watson, age 11, and John F. Watson, age 10, all of whom are enrolled in nonpublic schools. Mr. Watson is employed as an attorney, and is the sole support of his family, which consists of five persons (Mr. and Mrs. Watson and three minor children).

10. Each of the Interveners, as parents, belongs to the class of persons designated in the Act as the beneficiaries thereof and each intends to seek reimbursement thereunder.

11. The Interveners, as parents, have interests relating to the property which is the subject of this action, and are so situated that the disposition of this action, may, as a practical matter impair or impede their ability to protect those interests.

12. The Interveners, as parents, by virtue of the rights conferred upon them by this Act, have claims and defenses separate and distinct from those of the sole party defendant, Grace Sloan, the Treasurer of the Commonwealth of Pennsylvania. There is presently no party of record who can adequately assert the parental and personal rights, and the claims and defenses of the Interveners and their children. Unless this Court grants Interveners' Motion, their rights will be disposed of without adequate representation.

13. Granting Interveners' Motion will not delay this action nor will it prejudice the adjudication of the rights of any of the original parties.

14. Interveners attach hereto as Exhibit "A" the pleading which they propose to file which sets forth the defense for which this intervention is sought.

WHEREFORE, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, F. Carl Kretzmann, Katheryn L. Kretzmann, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, Seth W. Watson, Jr. and Anne P. Watson respectfully pray this Court to permit them to intervene as parties

defendant in this action pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

William B. Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr. Anne P. Watson

Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey

James E. Gallagher, Jr.
Attorney for Daniel F. X. Powell, Anna T. Powell

C. Clark Hodgson, Jr.
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MOTION OF DEFENDANT CROUTER, UNDER FEDERAL RULES OF CIVIL PROCEDURE 12, TO STRIKE PARAGRAPH 10 OF PLAINTIFFS' COMPLAINT AND TO DISMISS THE COMPLAINT

(Title Omitted in Printing)

MOTION TO STRIKE

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1. Intervenor Defendant, by his attorneys, moves to strike paragraph 10 of Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(f) upon the following grounds:

a. The allegations of paragraph 10 relate solely to allegations concerning the characteristics and alleged religious practices of "educational institutions", and as such, are clearly immaterial. Act 92 does not authorize and direct payment for the tuition of students in any particular kind of educational institution other than a nonpublic school as defined in §3(2) of the Act:

> "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

b. Unless the allegations of paragraph 10 are stricken, inquiry would have to be made of eligible parents to discover the religious practices or religious character, if any, of the schools to which the parents chose to send their children. Such inquiry is not required under the Act, and furthermore, is beyond the scope of judicial or executive inquiry as violative of the parents' and their children's rights under the Constitution of the United States and Constitution of the Commonwealth of Pennsylvania.

MOTION TO DISMISS

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2. Intervenor Defendant, by his attorneys, moves the Court to dismiss the Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and for lack of standing, and in support thereof, Defendant assigns the following reasons:

a. *First Count—Establishment of Religion—Motion To Dismiss for Failure To State a Claim*

The First Count of Plaintiffs' Complaint fails to state a claim upon which relief can be granted under the Establishment clause of the First Amendment in that:

(1) The Complaint fails to allege any facts to support the bare conclusory allegations in paragraph 13 that the Act is unconstitutional on its face and as applied.

(2) Contrary to Plaintiffs' allegations, the Act has solely the public and secular legislative

purpose and effect of giving parents financial assistance in educating their children in compliance with the compulsory school attendance requirements.

b. *Second Count—Free Exercise of Religion—Motion To Dismiss for Lack of Standing*

Plaintiffs do not have any legally recognizable interest under the Free Exercise Clause of the First Amendment in that the Complaint fails to establish that any of the Plaintiffs have religious beliefs, what such beliefs are, and to what extent, if any, Act 92 interferes with the free exercise of religion of any Plaintiff or with any religious practices of any Plaintiff.

c. *Second Count—Free Exercise of Religion—Motion To Dismiss for Failure To State a Claim*

Plaintiffs' Complaint fails to state a claim upon which relief can be granted under the Free Exercise Clause of the First Amendment in that the Complaint does not allege any facts that demonstrate that the Act, on its face, or as applied, coerces plaintiffs as individuals in the practice of their religion, constitutes compulsory taxation for the support of religion, or unlawfully discriminates against any religion.

d. *Third Count—Equal Protection of the Laws—Motion To Dismiss for Lack of Standing*

Plaintiffs do not have any legally recognizable interest under the Equal Protection Clause of the Fourteenth Amendment in that:

(1) The issue of Plaintiffs' standing to sue under the Equal Protection Clause has been de-

cided adversely to Plaintiffs' position and is res judicata by virtue of the decision in Lemon v. Kurtzman, 310 F. Supp. 35, 43 (1969) in which the Plaintiff herein, Alton J. Lemon, was a party Plaintiff, and in which the Defendant herein, Grace Sloan, was a party Defendant;

(2) There are no allegations to support the existence of any legally recognizable interest of the Plaintiffs' under the Equal Protection Clause of the Fourteenth Amendment;

(3) The Complaint fails to establish that Plaintiffs have a sufficient stake, or adverse interest under the Equal Protection Clause to challenge the Act as violative of the Equal Protection Clause of the Fourteenth Amendment; and

(4) The Complaint fails to establish that Plaintiff, Alton J. Lemon, has an interest, either as a parent, as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue on behalf of all other persons similarly situated, or that the other Plaintiffs have any interest sufficient to entitle them to sue on behalf of other persons similarly situated.

d. *Third Count—Equal Protection of the Laws—Motion To Dismiss for Failure To State a Claim*

The Complaint fails to state a claim upon which relief can be granted under the Fourteenth Amendment, Equal Protection Clause in that:

(1) The Complaint fails to allege that the Act, on its face, either expressly or by implica-

tion, requires or permits any discriminatory State action.

(2) The Complaint fails to establish that the Act, on its face or as applied, results in any discriminatory State action.

(3) The Complaint fails to allege, either expressly or by implication, that the Act requires or permits an invidious classification or discrimination of any kind based upon race.

(4) The allegations of the Complaint that the Act authorizes reimbursement payments to parents whose children attend schools which are "predominantly white, affluent and superior . . ." fails to constitute an allegation of denial of the equal protection of the laws to Plaintiffs.

WHEREFORE, Intervenor Defendant prays that the Court strike paragraph 10 of Plaintiffs' Complaint, and dismiss Plaintiffs' Complaint.

Henry T. Reath
Robert L. Pratter
for Duane, Morris & Heckscher
Attorneys for Intervenor Defendant

ORDER
(Title Omitted in Printing)

AND NOW, this 19th day of January, 197—, upon consideration of the motion of Jose Diaz, et al. for

permission to intervene as parties defendant pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and the Stipulation of counsel indicating no objection to the granting of the motion, and it appearing to the Court that the Interveners claim an interest relating to the property which is the subject of this action and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect that interest, it is ORDERED, ADJUDGED and DECREED that the motion of Jose Diaz, et al. be and it is hereby GRANTED.

It is FURTHER ORDERED that Jose Diaz, et al. file a responsive pleading to the Complaint within ten days from the date of this Order.

By the Court:

Joseph S. Lord, III,
J.

MOTION OF JOSE DIAZ, ET AL. TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(Title Omitted in Printing)

Defendants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, F. Carl Kretzmann, Katheryn L. Kretzmann, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, Seth W. Watson, Jr. and Anne P. Watson, respectfully move this Court to dismiss plaintiffs' complaint and to enter a judgment of dismissal in defendants' favor. In support thereof, defendants assign the following reasons:

I.

First Count

Paragraph 13—Establishment of Religion

1. The bare conclusory allegations in paragraph 13, "(a)", "(b)", "(c)", "(d)", "(e)", and "(f)", that the Act is unconstitutional on its face and as applied, fail to state any claim since the Act has solely the public and secular legislative purpose and effect of providing financial assistance to parents in the educating of their children in compliance with the compulsory school attendance requirements of law.

II.

Second Count

Paragraph 14—Free Exercise

2. The allegation of paragraph 14(a), that the Act is unconstitutional on its face and as applied because it "constitutes compulsory taxation for the support of religion" is insufficient as a matter of law, in that the Act achieves solely the public and secular legislative purpose of providing financial assistance to parents and does not require or permit support of religion.

3. The complaint fails to allege facts sufficient to show that the Act in any way "discriminates against or weakens" any religion or sect.

III.

Third Count

Paragraph 15—Equal Protection of the Laws

4. The complaint fails to allege that the Act on its face or as applied, either expressly or by implication, requires, permits or results in any discriminatory State action.

5. The complaint fails to allege, either expressly, or by implication that the Act requires or permits invidious classification or discrimination of any kind based upon race.

6. The allegation of the complaint that the Act authorizes payments for the tuition of students in educational institutions which by purpose or effect segregate students by race fails to constitute an allegation of a denial of the equal protection of the laws.

WHEREFORE, defendants, Jose Diaz, et al. respectfully pray the Court to enter an Order dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted and to enter a judgment of dismissal in defendants' favor.

William B. Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr., Anne P. Watson
Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey
James E. Gallagher, Jr.
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MOTION OF JOSE DIAZ, ET AL. TO DISMISS THE SECOND AND THIRD COUNTS OF THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE THEREUNDER

(Title Omitted in Printing)

Defendants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, F. Carl Kretzmann, Katheryn L. Kretzmann, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, Seth W. Watson, Jr. and Anne P. Watson, respectfully move this Court to dismiss the Second and Third Counts of plaintiffs' complaint on the ground that plaintiffs do not have standing to sue thereunder. In support thereof, defendants assign the following reasons:

I.

Second Count

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1. The complaint fails to allege facts sufficient to show that any of the plaintiffs have religious beliefs, what such beliefs are, and to what extent, if any, Act 92 interferes with the free exercise of any religious belief of any plaintiff or with any religious practice which he may have.

II.

Third Count

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2. The issue of plaintiff's standing to sue under the Equal Protection Clause is res judicata by virtue

of the decision of this Court in Lemon v. Kurtzman, 310 F. Supp. 35, 41-43 (1969), in which the plaintiff herein, Alton J. Lemon, was a party plaintiff and in which the defendant herein, Grace Sloan, was a party defendant.

3. In the alternative: (a) the complaint fails to allege facts sufficient to show that any individual plaintiff suffers, or is threatened by, any discrimination; (b) the complaint fails to allege facts sufficient to show that plaintiff, Alton J. Lemon has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue either on his own behalf or on behalf of all other persons similarly situated.

WHEREFORE, defendants, Jose Diaz, et al. respectfully pray the Court to enter an Order Dismissing the Second and Third counts of the plaintiffs' complaint.

William B. Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr., Anne P. Watson

Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Murial Harvey

James E. Gallagher, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action

No. 71-2223

Alton J. Lemon, Neal F. Bracken and
Benjamin S. Loewenstein

v.

Grace Sloan, State Treasurer of the
Commonwealth of Pennsylvania

Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife; F. Carl Kretzman and Katheryn L. Kretzmann, his wife; Arthur Harvey and Muriel Harvey, his wife; Daniel F. X. Powell and Anna T. Powell, his wife; and Seth W. Watson, Jr. and Anne P. Watson, his wife; and Henry E. Crouter,

Interveners

Before: William H. Hastie, Senior Circuit Judge, Joseph S. Lord, III, Chief District Judge, John B. Hannum, District Judge

OPINION

April 6, 1972

By Joseph S. Lord, III, Chief District Judge

Plaintiffs brought this suit to declare the Pennsylvania Parent Reimbursement Act for Nonpublic Education[1] (the "Act") unconstitutional and to enjoin its operation. The Act is challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction of the controversy pursuant to 28 U.S.C. §§1331, 1343(3), 2281 and 2284. Presently before the court are motions of defendant and intervening defendants to dismiss the complaint for lack of standing and failure to state a claim upon which relief can be granted.

The plaintiffs are citizens, residents and taxpayers of the Commonwealth of Pennsylvania who have paid the Pennsylvania cigarette tax which finances the Act. Plaintiff Lemon is also the parent of a Negro child attending a public school in Pennsylvania. Defendant Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued in that capacity. Intervening defendants are citizens, residents and taxpayers of the Commonwealth of Pennsylvania. Interveners are parents of one or more students who are enrolled in nonpublic schools in Pennsylvania

[1] Act 92 of the Pennsylvania General Assembly, August 27, 1971. Appendix A, *infra*.

and interveners are eligible for tuition reimbursement payments under the Act.

The Act provides for the reimbursement of tuition payments to parents whose children have completed the school year in a nonpublic school located in Pennsylvania which fulfills the compulsory school attendance requirements under Pennsylvania law and the requirements of Title VI of the Civil Rights Act of 1964.[2] In its legislative findings and declaration of policy, the Pennsylvania General Assembly determined that parents who send their children to nonpublic schools assist the state in reducing the rising cost of public education. The General Assembly found that if inflation and rising costs of education force parents of children now enrolled in nonpublic schools to transfer a substantial number of their children to public schools, "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state."[3] Therefore, in order to insure that parents can continue to aid the state by sending their children to nonpublic schools and in order to foster educational opportunity for all children, the General Assembly established the tuition reimbursement program.

The first ground of defendants' motion to dismiss is that the complaint fails to state a claim under the Establishment Clause of the First Amendment upon

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[2] Title VI prohibits discrimination on the ground of race, color, or national origin in programs receiving federal financial assistance. 42 U.S.C. §2000d *et seq.*

[3] Section 2(4), Act 92, Appendix A.

which relief can be granted.[4] Plaintiffs allege that the Act authorizes payment for the tuition of students in educational institutions which:

> "* * * (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, cirriculums [sic] and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach." ¶10 Complaint.[5]

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[4] Defendants concede and we find that plaintiffs have standing to sue under the Establishment Clause. Flast v. Cohen, 392 U.S. 83 (1968).

[5] Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' right of free exercise of religion, privacy, and freedom of expression.

F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of nonpublic schools are

For the purpose of considering the motion to dismiss, we must accept these allegations as true. Therefore, the issue before us is whether the Establishment Clause prohibits the state from reimbursing parents for the tuition costs of sending their children to church-related elementary and secondary schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). *See also* Everson v. Board of Education, 330 U.S. 1 (1947), Engle v. Vitale, 370 U.S. 421 (1962).

> "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper which can be used to measure the precise degree to which these three factors

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constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

> "• • • The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." Brown and Williamson Tobacco Corp. v. U. S., 201 F. 2d 819, 822 (C.A. 6, 1953). See also August v. Bd. of Public Instruction, 306 F. 2d 862, 868 (C.A. 5, 1962), 2A J. Moore, Federal Practice ¶12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools is premature and should be raised once such information is actually sought. We therefore deny defendant intervener's motion to strike paragraph 10.

are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."

Tilton v. Richardson, 403 U.S. 672, 677-678; 29 L. Ed. 2d 790, 798 (1971).

In Lemon v. Kurtzman, 403 U.S. 602, 612-613; 29 L. Ed. 2d 745, 755 (1971), the Supreme Court restated the three tests it has developed for determining whether a particular program offends the Establishment Clause.

"* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 20 L. Ed. 2d 1060, 1065, 88 S. Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, at 674, 25 L. Ed. 2d at 704."

The stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children. The legislative findings and declaration of policy indicate that the General Assembly is concerned with maintaining the present standards of public education which it finds would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced

to send their children to public schools. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." Lemon, supra, 403 U.S. at 613. Therefore, according the stated legislative intent appropriate deference, we conclude that the Act expresses a legitimate secular objective consistent with the Establishment Clause. See Allen, supra, 392 U.S. at 243. Lemon, supra, 403 U.S. at 613; Tilton, supra, 403 U.S. at 678-679.

We must next determine whether the Act has the primary effect of advancing religion. The very existence of this "test" reflects the Court's determination that there may be some forms of aid to church-related activities which do not involve that sponsorship, financial support or the active involvement of the state in religious activity which the Establishment Clause was intended to prevent. Although the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," Lemon, supra, 403 U.S. at 612, the Court has readily acknowledged that the test is not whether a religious institution derives some benefit from the government program. In upholding the constitutionality of federal aid for construction of buildings to be used for secular education at church-related colleges and universities, the Court stated:

> "* * * Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, text-

> books and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [Everson, supra, Allen, supra, Walz, supra] * * * The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." Tilton, supra, 403 U.S. at 679. See also Walz, supra, 397 U.S. at 671-672.

In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly the Supreme Court decisions which have considered forms of aid to church-related schools under the primary effect test. In Everson, the Supreme Court upheld a state law which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. The Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. The Court found that the purpose and effect of the law was to promote general public welfare by helping parents get their children safely to and from accredited schools. The Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services

"so separate and so indisputably marked off from the religious function." Everson, supra, 330 U.S. at 18.

In Allen, the Supreme Court upheld a New York law which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12 including students attending private schools. The Court found no violation of the primary effect test for although the Court recognized that books can have an inherent religious significance which bus rides do not, the law provided that only secular books could be loaned and each book had to be approved by the public school authorities. The Court noted that the state has a legitimate interest in the manner in which private schools perform their secular education function. On the basis of the "meager record" in the case, the Court could not conclude that:

> "* * * either all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

Therefore, the Court upheld the law as providing a general service to all students which was consistent with the state's interest in promoting secular education in all schools.

In Lemon, the Court held that a Pennsylvania law which reimbursed private schools for the cost of teachers' salaries, textbooks and instructional materials in certain specified secular subjects and a Rhode

Island law which supplemented the salaries of teachers of secular subjects in private elementary schools violated the Establishment Clause because the programs involved excessive government entanglement with religion. Although the Court found it unnecessary to apply the primary effect test, the Court's analysis of the statutes in terms of this test is instructive. The Court reaffirmed its agreement in principle with the holding in Allen that "secular and religious education are identifiable and separable." However, the Court noted that both the Pennsylvania and Rhode Island legislatures recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented." Therefore, in order to guarantee that state financial aid supports only secular education in these schools, the two legislatures imposed statutory restrictions on their aid programs. Although the Court did not reach the question of whether these restrictions effectively prevented the aid programs from having a primary effect which violated the Establishment Clause, it is clear from the opinion that the Court agreed that given the nature of the proposed aid and the character of the school, the state was required to impose restrictions to insure that the aid benefited only secular education in order to comply with the Establishment Clause.

> "* * * The Rhode Island Legislature has not, *and could not,* provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses,*

> *that subsidized teachers do not inculcate religion*—indeed the State here has undertaken to do so." Lemon, supra, 403 U.S. at 619 (emphasis added).

Finally, in Tilton, the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute in terms of its effect, the Court first reviewed the provisions of the law and found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions. However, the Court concluded that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the Establishment Clause primary effect test. This decision represents the first instance in which the Court has invalidated legislation under that test.

> "* * * It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. * * * If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." Tilton, supra, 403 U.S. at 683.

The Court next examined the administration of the law and found that the restrictions on use had been complied with by the recipient institutions.

Finally, on the basis of the record before it, the Court refused to conclude that religion so permeated the secular education provided by church-related colleges and universities that their religious and secular education functions were inseparable and that therefore government support of any activity of these institutions necessarily involved impermissible support of religion.[6]

These cases establish the following points of reference for any application of the primary effect test. First, absent any evidence to the contrary, the Supreme Court accepts the principle that secular and religious education in church-related schools are identifiable and separable. Second, the state has a legitimate interest in promoting the general welfare and the secular education of all school children. Third, the state may enact programs to promote the general welfare which include sectarian school students among the recipients provided the aid given has no inherent religious significance (e.g., bus rides, public health services), even though the aid may facilitate the operation of sectarian schools. Fourth, the state may enact programs to promote secular education in accredited schools, including church-related schools, provided the state can be certain from the nature of the aid granted or the restrictions placed upon its use that the programs will assist only secular education in church-related schools and provided further that the restrictions required to insure secular use do not give rise to excessive government entangle-

[6] The Court also found that the legislation did not foster excessive government entanglement with religion.

ment with religion in the administration of the aid program. Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, the court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.

The Act under review reimburses parents who have expended money for tuition at nonpublic schools. The legislative findings and declaration of policy underscore the legislative judgment that this type of aid will have the effect of enabling nonpublic schools, which include church-related schools, to continue to operate in Pennsylvania. The cases are clear that the state cannot directly support religious education in church-related schools although in some circumstances the state may provide sectarian schools with "secular, neutral or nonideological services, facilities, or materials." Lemon, supra, 403 U.S. at 616. The present Act contains no provisions to insure that state funds are restricted to such purposes. Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

> "* * * General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." Walz, supra, 397 U.S. at 690 (Brennan, J. concurring).

Recognizing this, defendants maintain that the Act is constitutional because the Act aids the parents and not the schools. The state enters into no direct relationship with nonpublic schools because funds are paid directly to parents who have paid tuition to nonpublic schools. Once the parents receive the funds, the state has no control over their use.[7] Fur-

[7] Defendants cite Hysong v. Gallitzin Borough School District, 164 Pa. 629 (1894), for the proposition that payment of state funds is not unconstitutional because the recipients may use these funds for religious purposes. Hysong involved the question of whether a public school could employ Catholic nuns to teach secular subjects. One argument raised by plaintiffs was the fact that the nuns had taken a vow of poverty and turned over their salaries to their church and therefore state salary payments were being used to support religion. The Pennsylvania Supreme Court rejected this argument on the grounds that "American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus *earnings* as suits their own notions." Hysong, supra, 164 Pa. at 656 (emphasis added).

Hysong is clearly distinguishable from the case before us because there is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members. In determining whether state payments under the Act are constitutional, we must examine the criteria which qualify an individual for receipt of the funds. Certainly there can be no objection to state payments to state employees for secular teaching services in the public schools. The issue before this court is whether individuals may receive state funds solely because they have paid tuition at a church-related school.

thermore, defendants argue that in Everson and Allen the Supreme Court distinguished between aid to parents and students and aid to institutions and held that state aid to parents and students does not have the primary effect of advancing religion even though sectarian schools benefit from transportation services and nonreligious textbook loans.

First, we disagree with defendants' reading of Everson and Allen. The critical factor in both cases was that the subsidized school activities were non-ideological or secular and therefore the public grants did not directly support religious education in the sectarian schools, although the aid did support the operation of the schools. But the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools. In Allen, the fact that the Court considered the parents and students as the beneficiaries of the aid would not have prevented the Court from striking down the law if it provided for loans of religious books to the schools. The school aid cases emphasize that the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion.

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act

unconstitutional.[8] Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, Almond v. Day, 197 Va. 419, 427, 89 S.E. 2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools.

Defendants argue that we cannot ascertain that parents will be encouraged to send their child to church-related schools because of the state aid pro-

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[8] If the Act did include restrictions on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in its administration of these restrictions. See Lemon and Tilton. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools.

gram. Parents may send their child to a sectarian school one year and despite the reimbursement payment decide to enroll their child in another type of school the next year. Therefore defendants argue that we cannot conclude that the Act has the necessary effect of advancing religion. However, Tilton established that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time. In Tilton, there was no evidence that the colleges receiving construction grants planned to convert the buildings into chapels or otherwise use them for religious activities after twenty years had passed. Nevertheless, the Court found the possibility of such use enough to strike down the provision of the statute which permitted unrestricted use of the buildings after twenty years. It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

State courts have held that tuition grant programs in which the state channeled funds through the parents or students to the schools violate the First Amendment and state constitutional provisions.[9]

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[9] "The parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State to the school is transmitted." Almond v. Day, supra, 89 S.E. 2d at 857.

Almond v. Day, supra, Hartness v. Patterson, 179 S.E. 2d 907 (S. Carolina 1971), Opinion of the Justices, 259 N.E. 2d 564 (Mass. 1970). Defendants argue that unlike the "conduit" plans, the Pennsylvania Act does not make payments to parents in a form that can only be used at an educational institution. Therefore, it cannot be established that the dollar used to pay tuition is the dollar the parents received from the state. However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not

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"We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." Hartness v. Patterson, supra, 179 S.E. 2d at 909.

the main, purpose of a parent's sending his child to a religious school is to insure the early inculcation of religion. See Walz, supra, 397 U.S. at 671. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable sequitur that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. See Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971).

Having concluded that the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education, we need not consider defendants' arguments that the complaint should be dismissed for lack of standing and failure to state a claim under the Free Exercise and Equal Protection Clauses. We therefore deny defendants' motion to dismiss the complaint.

ORDER

AND NOW, this 6th day of April, 1972, it is ORDERED that the defendants' motion to dismiss the complaint be and it hereby is DENIED.

By the Court:

William H. Hastie
Senior Circuit Judge

Joseph S. Lord, III
Chief District Judge

John B. Hannum
District Judge

APPENDIX A

No. 92

AN ACT

HB 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of

educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of

Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reimbursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however,

That it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other persons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P. L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbursement hereunder, the parent of a

student shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents.—Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements

submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a wilfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A.D. 1971.
Milton J. Shapp

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

C. DeLores Tucker
Secretary of the Commonwealth

ORDER

(Title Omitted in Printing)

AND NOW, this 28th day of April, 1972, upon consideration of the motions of the defendant and intervening defendants to dismiss Counts 2 and 3 of the plaintiffs' complaint, it is ORDERED that they be and hereby are GRANTED on the authority of Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).

By the Court,

William H. Hastie
Senior Circuit Judge

Joseph S. Lord, III
Chief District Judge

John B. Hannum
District Judge

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ANSWER

(Title Omitted in Printing)

First Defense

Defendant Grace Sloan, by her attorneys, answers to the complaint herein as follows:

1. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the complaint.

2. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth as to the allegations in Paragraph 2 of the complaint.

3. Admitted.

4. Admitted.

5. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of the complaint.

6. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the complaint.

7. Admitted.

8. Admitted. Defendant admits that on August 27, 1971 the Governor of the Commonwealth of Pennsylvania signed into law Act No. 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reimbursement Act for Nonpublic Education." Defend-

ant further admits that Appendix A is a true and correct copy of said Act. Defendant denies that plaintiffs have correctly summarized the text of the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

9. Denied. Defendant is advised by counsel that the allegation of Paragraph 9 of the complaint is a conclusion of law which requires no response.

10. Denied. Defendant denies that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

11. Denied. Defendant denies that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

12. Denied. Defendant denies that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

13. Denied. Defendant is advised by counsel that the allegations of Paragraph 13 of the complaint are conclusions of law which require no response.

14. Denied. Defendant is advised by counsel that the allegations of Paragraph 14 of the complaint are conclusions of law which require no response.

15. Denied. Defendant is advised by counsel that the allegations of Paragraph 15 of the complaint are conclusions of law which require no response.

16. Defendant admits that there is a genuine case or controversy between the parties with respect to those allegations of the complaint, if any, which aver that Act No. 92 violates the Establishment Clause of the First Amendment of the Constitution of the United States.

17. Denied. Defendant is advised by counsel that the allegations of Paragraph 17 of the complaint are conclusions of law which require no response.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint, together with its costs and disbursements in this action and such other relief as may be just and proper.

J. Shane Creamer
Attorney General

J. Justin Blewitt, Jr.
Deputy Attorney General
Attorneys for Defendant

ANSWER OF INTERVENER DEFENDANTS JOSE DIAZ, ET AL.

(Title Omitted in Printing)

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1. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the complaint.

2. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the complaint.

3. Admitted.

4. Admitted.

5. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the complaint.

6. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the complaint.

7. Admitted.

8. Intervener Defendants admit that on August 27, 1971 the Governor of the Commonwealth of Pennsylvania signed into law Act 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reim-

bursement Act for Nonpublic Education". Intervener Defendants further admit that "Appendix A" is a true and correct copy of said Act. Intervener Defendants deny that plaintiffs have correctly summarized the text of the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

9. Intervener Defendants are advised by counsel that the allegation of paragraph 9 of the complaint is a conclusion of law which requires no response.

10. Denied. Intervener Defendants deny that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

11. Denied. Intervener Defendants deny that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

12. Denied. Intervener Defendants deny that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

13. Intervener Defendants are advised by counsel that the allegations of paragraph 13 of the complaint are conclusions of law which require no response.

14. Intervener Defendants are advised by counsel that the allegations of paragraph 14 of the complaint are conclusions of law which require no response.

15. Intervener Defendants are advised by counsel that the allegations of paragraph 15 of the complaint are conclusions of law which require no response.

16. Intervener Defendants admit that there is a genuine case or controversy between the parties with respect to those allegations of the complaint, if any, which aver that Act 92 violates the Establishment Clause of the First Amendment of the Constitution of the United States. Intervener Defendants deny that there is a genuine case or controversy with respect to any other claims alleged by plaintiffs.

17. Intervener Defendants are advised by counsel that the allegations of paragraph 17 of the complaint are conclusions of law which require no response.

First Defense

18. The complaint fails to state a claim upon which relief can be granted.

Second Defense

19. Intervener Defendants, Seth W. Watson, Jr. and Anne P. Watson, his wife, are parents of Ellen P. Watson, who is enrolled in a nonpublic school, as defined in the Act, which is nonchurch-related.

20. Intervener Defendants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, F. Carl Kretzmann and Katheryn L. Kretzmann, are parents of children who are enrolled

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in nonpublic schools, as defined in the Act, which are church-related.

21. With respect to the Intervener Defendants named in paragraph 19 above, the complaint fails to state a claim under the Establishment Clause upon which relief can be granted.

22. With respect to the Intervener Defendants named in paragraph 20 above, the complaint fails to state a claim under the Establishment Clause upon which relief can be granted.

Third Defense

23. Intervener Defendants incorporate by reference the allegations of paragraphs 19 and 20.

24. The Act provides public welfare benefits to all of these parents in the form of the payments thereunder.

25. To deny to these parents the benefits of the Act, solely because their said children attend nonpublic schools, would constitute a denial to them of the Equal Protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth Defense

26. Intervener Defendants incorporate by reference the allegations of paragraphs 19 and 20.

27. The Act provides public welfare benefits to all of these parents in the form of the payments thereunder.

28. To deny to the parents named in paragraph 20 above, the benefits of the Act, solely because they exercise their constitutional right to send their children to church-related schools under the Compulsory Attendance Laws of the Commonwealth of Pennsylvania, would constitute a denial to them of the equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Intervener Defendants pray the Court to dismiss the Complaint and enter judgment in favor of all defendants, with costs.

William Bentley Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr. and Anne P. Watson

Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey and Muriel Harvey

James E. Gallagher, Jr.
Attorney for Daniel F. X. Powell and Anna T. Powell

C. Clark Hodgson, Jr.
Attorney for F. Carl Kretzmann and Katheryn L. Kretzmann

Of Counsel:
Ball & Skelly
127 State Street
Harrisburg, Penna. 17101

Stradley, Ronon, Stevens
& Young
1300 Two Girard Plaza
Philadelphia, Penna. 19102

William D. Valente
Villanova, Penna. 19085

ANSWER OF INTERVENOR DEFENDANT CROUTER

(Title Omitted in Printing)

First Defense

Intervenor Defendant Crouter admits that this action purports to be a civil action brought by plaintiffs on their own behalf and on behalf of others similarly situated for a temporary and permanent injunction as alleged by plaintiffs in paragraph 1. Intervenor Defendant Crouter admits that on August 27, 1971, the Governor of the Commonwealth of Pennsylvania signed into law Act 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reimbursement Act for Nonpublic Education" (hereinafter referred to as the "Act") as alleged in paragraph 8. Intervenor Defendant Crouter admits the allegations contained in paragraphs 2, 3, 7 and 16, only in so far as they allege a cause of action under the Establishment Clause of the First Amendment of the United States Constitution.

Intervenor Defendant Crouter denies the allegations of paragraph 10 on the grounds that the Act speaks for itself and is absolutely silent as to the religious or nonreligious practices of schools attended by students whose parents are eligible to apply for benefits under the Act. Furthermore, said allegations are irrelevant and any attempted inquiry into the religious practices of schools or of parents vio-

lates the Free Exercise provisions of the First Amendment and the rights of privacy and freedom of expression guaranteed under the First, Ninth, and Fourteenth Amendments.

Intervenor Defendant Crouter denies the balance of the allegations in paragraph 1, including the allegation that the plaintiffs properly sue on behalf of all others similarly situated and denies each and every allegation contained in paragraphs 11, 12, 13, 14, 15 and 17.

Intervenor Defendant Crouter is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 4, 5, 6 and 9 and every remaining allegation in plaintiffs' complaint.

Second Defense

Plaintiffs' complaint alleges no facts which demonstrate that plaintiffs have standing to sue, other than to assert claims under the Establishment Clause of the First Amendment.

Third Defense

Plaintiffs' complaint fails to state a claim upon which relief can be granted.

Fourth Defense

Inquiry into the religious practices of nonpublic schools or of parents applying for benefits under the

Act violates the Free Exercise provisions of the First Amendment and the rights of privacy and freedom of expression guaranteed under the First, Ninth and Fourteenth Amendments.

Fifth Defense

Plaintiffs' complaint alleges no basis for them to sue on behalf of others similarly situated.

WHEREFORE, Intervenor Defendant Crouter demands that the plaintiffs' complaint be dismissed and that judgment be entered in favor of all defendants and Intervenor Defendants.

Duane, Morris & Heckscher

By Henry T. Reath

Attorneys for Intervenor Defendant, Crouter

MOTION OF INTERVENER DEFENDANTS SETH W. WATSON, JR. AND ANNE P. WATSON FOR SUMMARY JUDGMENT

(Title Omitted in Printing)

Intervener defendants Seth W. Watson, Jr. and Anne P. Watson by their attorney William B. Ball, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment in their favor dismissing plaintiffs' complaint for the reason that the pleadings and affidavits of record show that there is no genuine issue as to any material fact and that the movants are entitled to a judgment as a matter of law.

William B. Ball
Attorney for Intervener Defendants Seth W. Watson, Jr. and Anne P. Watson

AFFIDAVIT OF INTERVENER DEFENDANTS SETH W. WATSON, JR. AND ANNE P. WATSON

(Title Omitted in Printing)

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

SETH W. WATSON, JR. and ANNE P. WATSON, being duly sworn according to law, depose and say:

1. That they are two of the Defendants in this action who were granted intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure by Order of this Court dated January 19, 1972;

2. That they are taxpayers and citizens of the United States of America and the Commonwealth of Pennsylvania who reside with their three children in Montgomery County which is within the Eastern District of Pennsylvania;

3. That they are "parents" of a "student" who is enrolled in a "nonpublic school" as those terms are defined in Act 92 of the Laws of Pennsylvania, 1971, which Act is known as the "Parent Reimbursement Act for Nonpublic Education";

4. That one of their children, Ellen P. Watson, age 12, is enrolled as a sixth-grade student at the Baldwin School, a nonpublic school in Montgomery County, Pennsylvania, wherein the requirements of the Pennsylvania Compulsory School Attendance Law

may be fulfilled and which meets the requirements of Title VI of the Civil Rights Act of 1964;

5. That the said school is not a school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose;

6. That the deponents have paid tuition to the Baldwin School for and on behalf of Ellen P. Watson for the academic year 1971-1972;

7. That they intend to seek and will be eligible for a tuition reimbursement payment under the Act based upon the tuition paid on behalf of Ellen P. Watson, and

8. That they will fulfill and observe all of the requirements of the Act necessary to obtain reimbursement.

Seth W. Watson, Jr.
Anne P. Watson

Sworn to and subscribed before me this 3rd day of May A.D. 1972.

Thomas J. Cauley
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires February 1, 1973.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Title Omitted in Printing)

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1. On September 13, 1971, plaintiffs' Complaint was filed seeking to have the Parent Reimbursement Act for Nonpublic Education (Act 93 of the Laws of Pennsylvania, August 27, 1971) declared unconstitutional and payments thereunder enjoined.

2. On November 12, 1971, defendant Grace Sloan filed a Motion To Dismiss the Complaint. Subsequently, intervener defendants filed similar Motions To Dismiss.

3. On April 6, 1972, after oral argument, this Court denied defendants' and intervener defendants' Motions To Dismiss, holding that the First Count of Plaintiffs' Complaint made out a cause of action under the Establishment Clause of the United States Constitution, and that "the failure of the state to insure that the funds are restricted to secular education or general welfare services, renders the Act unconstitutional."

4. On May 2, 1972, defendant and intervener defendants filed Answers to plaintiffs' Complaint. Those Answers, insofar as they relate to the First Count of Plaintiffs' Complaint, did not raise any issues of fact other than those regarding which Affidavits are herewith filed. Consequently, there is

no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law pursuant to Rule 56 F.R. Civ. P.

5. In support of this Motion, plaintiffs rely upon the Opinion of this Court entered on April 6, 1972, the pleadings and the Affidavits of plaintiffs attached hereto.

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs, declare the Parent Reimbursement Act for Nonpublic Education unconstitutional on its face, and permanently enjoin defendant Grace Sloan from paying out any funds to reimburse any parents pursuant to said Act.

Mann and Ungar
By: Theodore R. Mann
Leo Pfeffer
Attorneys for Plaintiffs

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

AFFIDAVIT

ROBERT BAER COHEN, ESQUIRE, being duly sworn according to law, deposes and says that he is an attorney practicing in the Commonwealth of Pennsylvania; that he knows of his own personal knowledge that Benjamin S. Loewenstein is a citizen, resident and taxpayer in the United States and in the

Commonwealth of Pennsylvania; and that Benjamin S. Loewenstein has purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

Robert Baer Cohen

Sworn to and subscribed before me this 3rd day of May, 1972.

Linda J. Wondoloski
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires August 18, 1975.

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

AFFIDAVIT

ALTON J. LEMON, being duly sworn according to law, deposes and says that he is a citizen, resident and taxpayer in the United States and in the Commonwealth of Pennsylvania; that he has purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

Alton J. Lemon

Sworn to and subscribed before me this 3rd day of May, 1972.

Linda J. Wondoloski
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires August 18, 1975.

AFFIDAVIT

(Title Omitted in Printing)

NEAL F. BRACKEN, being duly sworn according to law, deposes and says that he is a citizen, resident and taxpayer in the United States and in the Commonwealth of Pennsylvania; that he purchased at all times relevant to the Complaint filed in the above matter, and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

Neal F. Bracken

Sworn to and subscribed before me this 8th day of May, 1972.

Linda J. Wondoloski
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires August 18, 1975.

ORDER

(Title Omitted in Printing)

AND NOW, this 20th day of June, 1972, it is ORDERED as follows:

1. It appearing that the plaintiffs seek no relief against the intervenors SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument.

2. Oral argument on the plaintiffs' motion for summary judgment shall be had on Thursday, July 6, 1972, at 10:00 a.m., under the following terms and conditions:

(a) Plaintiffs shall be permitted thirty minutes for argument and the defendants shall be entitled to thirty minutes for argument to be divided among the State and intervenors as they may see fit.

(b) The parties shall direct their arguments to the following:

(i) whether the holding denying the motion to dismiss requires the entry of judgment for the plaintiffs;

(ii) whether on its face and in light of the fact that the majority of students enrolled in Pennsylvania nonpublic schools attend church-related schools, the Act can properly be viewed

as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related.

For the Court,

Joseph S. Lord, III
Ch. J.

PARENT APPLICATION FORM 86a

VERIFIED STATEMENT OF CLAIMANT FOR REIMBURSEMENT OF TUITION FOR THE 1971-72 SCHOOL YEA.

PENNSYLVANIA PARENT ASSISTANCE AUTHORITY

...Pennsylvania Parent Reimbursement Act for nonpublic ...reimbursement of tuition paid (or contracted to ... a maximum of $75 per year for elementary and $150 ... (7th grade) school student who has completed the ... a nonpublic school or schools.

... to be eligible for reimbursement this form must be ... and returned to the Pennsylvania Parent ... (PPAA) no later than July 15, 1972. However, ... such this form immediately after the close of the ...

... this form to PPAA will not be acknowledged ... a self addressed and stamped post card. The ... from PPAA, if the application form is ... and be your receipt of a check on or about ... 1972.

DIRECTIONS FOR PARENTS

A separate application must be used for each nonpublic school in which you have a student enrolled. If you need additional forms contact the school or PPAA.
Read "EXPLANATION" on back of this form, then proceed to do in the following sections:

1. Print name and address of Parent or Guardian.
2. Print information requested for each student enrolled in the nonpublic school identified in section (2) below.
   IMPORTANT: If student's address is different from parent's address shown in section (1), also enter student's name and address on the back of this page.
3. Enter the telephone number and social security number of each parent or guardian.

AFTER END OF SCHOOL YEAR

1. Take the application form to a Notary Public, sign it in his presence and have him complete section (4).
2. Take this application form to the student's school after have school completed session (a).

AFTER SCHOOL CERTIFICATION

- If tuition has been paid, attach a receipted tuition bill. However, completion of section (5) will serve as the necessary receipt.
- If tuition has NOT been fully paid, attach a copy of your signed contract (see "EXPLANATION"). After completing the above steps, mail the application form to PPAA, P.O. Box 1505, Philadelphia, Pennsylvania 19105, not later than July 15, 1972.

...dian Name and Address

Mr. LAST NAME

NUMBER

COUNTY STATE ZIP CODE

SEE REVERSE SIDE FOR COUNTY CODES

Name Mi Last Name Sex

...ATORY WHICH MORE THAN ... THE SAME SCHOOL

ENTER "0" IF TUITION IS PAID
ENTER "0" IF CONTRACT FOR TUITION ...
ATTACH A COPY OF EACH CONTRACT ...

...NUMBER FATHER'S OR GUARDIAN'S SOC. SEC. NO. MOTHER'S SOC. SEC. NO.

...ICATION

...a resident of Pennsylvania and that the ... have been COMPLETED the school year in ... indicated in (2) above and that the ... appearing on the front and back of this form ... to the best of my knowledge, information ... belief, and the actually provided in the ... ACT FOR NONPUBLIC EDUCATION"

...'s Signature

...ATION

...Parent or Guardian has has the ... in the nonpublic school (see ... 1971-72 school year and that the ... tuition has been paid or ... in section (2) above

Subscribed and Sworn (affirmed) to before ...

This _____ Day of _____ 19__

SIGNATURE OF NOTARY PUBLIC

Commission Expires

School name and address (Complete if blank)

...AUTHORIZED AGENT DATE

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EXPLANATION

NONPUBLIC SCHOOL—Any school (other than a public school in the Commonwealth of Pennsylvania) that satisfies the compulsory school attendance requirements of law and meets the requirement of Title VI of the Federal Civil Rights Act of 1964 (Public Law 88-352).

PARENT—A resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis (a person standing in the place of a parent) to such child.

STUDENT—A resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

TUITION—All charges made by a nonpublic school to the parent for the education of the student. Where the parent is not charged tuition separately per student, attach explanation of how tuition is charged.

ELEMENTARY—Kindergarten and 1st through 6th grade.

SECONDARY—7th through 12th grade.

RECEIPT—If the school fails to complete section (5), the parent must attach a copy of the nonpublic tuition bill.

CONTRACT—Contract as used herein shall mean a written agreement between a nonpublic school and a parent to pay tuition charges.

MULTIPLE SCHOOLS—Claims for reimbursement for tuition paid at a nonpublic school for student who attended more than one school during the school year [illegible] considered by the Authority, if a separate sheet is attached showing the name and address of the schools and dates of attendance by the child as well as tuition paid.

⑤ STUDENT'S ADDRESS DIFFERENT THAN PARENT

Print student's name and address below for each student listed on the front of this form whose address is different from that shown for parent or guardian in section (1).

FIRST NAME	MI	LAST NAME	STREET ADDRESS	CITY	STATE

County Codes:

[illegible]	19 Cameron	25 Delaware	34 Juniata	[illegible]	[illegible]
02 Allegheny	20 Carbon	26 Elk	35 Lackawanna	58 Snyder	69 Wyoming
03 Armstrong	21 Centre	27 Erie	36 Lancaster	59 Somerset	70 York
04 Beaver	22 Chester	28 Fayette	37 Lawrence	60 Sullivan	71 Yukon
05 Bedford	23 Clarion	29 Forest	38 Lebanon	61 Susquehanna	72 Alaska
06 Berks	24 Clearfield	30 Franklin	39 Lehigh	62 Tioga	73 Delaware
07 Blair	25 Clinton	31 Fulton	40 Luzerne	63 Union	74 Washington
08 Bradford	26 Columbia	32 Greene	41 Lycoming	64 Venango	75 Wisconsin
09 Bucks	27 Crawford	33 Huntingdon	42 McKean	65 Warren	76 West Virginia
10 Butler	28 Cumberland	34 Indiana	43 Mercer	66 Washington	77 Wyoming
11 Cambria	29 Dauphin	35 Jefferson	44 Mifflin	67 Wayne	78 York
12 Cameron	30 Delaware	36 Juniata	45 Monroe	68 Westmoreland	79 Yukon
13 Carbon	31 Elk	37 Lackawanna	46 Montgomery	69 Wyoming	80 Alaska
14 Centre	32 Erie	38 Lancaster	47 Montour	70 York	81 Delaware
15 Chester	33 Fayette	39 Lawrence	48 Northampton	71 Yukon	82 Washington
16 Clarion	34 Forest	40 Lebanon	49 Northumberland	72 Alaska	83 Wisconsin
17 Clearfield	35 Franklin	41 Lehigh	50 Perry	73 Delaware	84 Washington
18 Clinton	36 Fulton	42 Luzerne	51 Philadelphia	74 Washington	85 Wisconsin
19 Columbia	37 Greene	43 Lycoming	52 Pike	75 Wisconsin	86 West Virginia
20 Crawford	38 Huntingdon	44 McKean	53 Potter	76 West Virginia	87 Wyoming
21 Cumberland	39 Indiana	45 Mercer	54 Schuylkill	77 Wyoming	88 York
22 Dauphin	40 Jefferson	46 Mifflin	55 Snyder	78 York	89 Yukon

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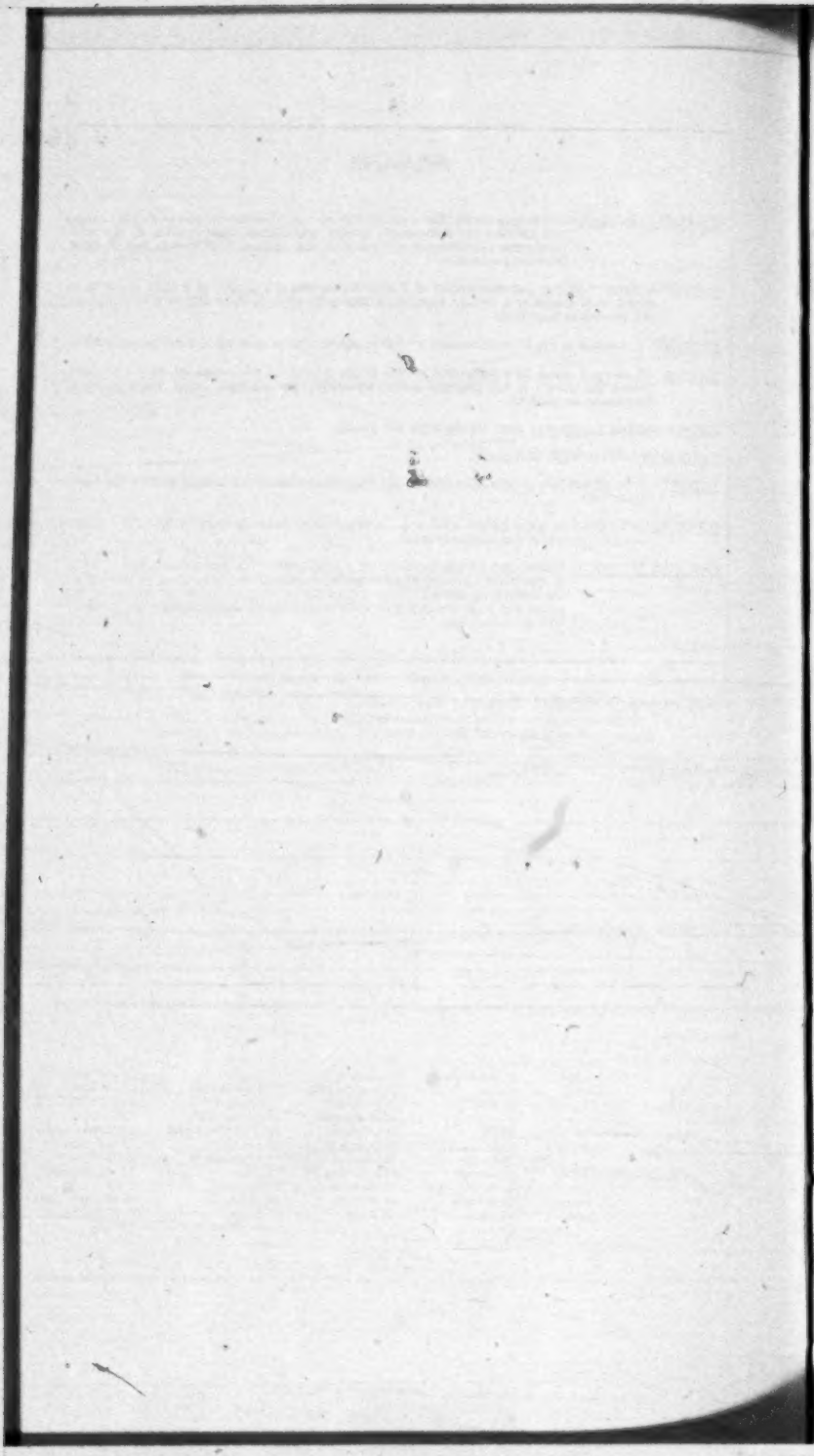

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ORDER
(Title Omitted in Printing)

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act for Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

By the Court:
William H. Hastie
Senior Circuit Judge
Joseph S. Lord, III
Chief District Judge
John B. Hannum
District Judge

MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e)

(Title Omitted in Printing)

Intervenor defendant Crouter in the above matter, by his attorney, Henry T. Reath, Esquire, and Duane, Morris and Heckscher, moves Your Honorable Court to alter or amend its Order and Judgment of July 21, 1972, in the following respects and for the following reasons:

1. On July 21, 1972, a three judge Court, consisting of the Honorable Judges Hastie, Lord and Hannum, handed down its Order, copy of which is attached, granting plaintiffs' motion for summary judgment.

2. Intervenor defendant now moves Your Honorable Court to strike from said Order the following language:

> ". . . and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, . . ."

3. There is no evidence of record that would support the foregoing statement of fact. To the contrary, the allegations bearing on the religious prac-

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tices of schools who charge tuition that would be eligible for parent reimbursement, are contained in paragraph 10 of plaintiffs' complaint, all of which allegations were denied and put at issue in defendant's answer and that of intervenor defendants.

4. There is no evidence in this record as to the number of parents applying for reimbursement under the Act, since all the applications have not yet been received or processed. Furthermore, the application form does not require nor does the Act itself permit answers or inquiry regarding the religious or non-religious practices of said schools. The only eligibility requirement is that the school meet the compulsory educational requirements of the Commonwealth.

5. Furthermore, said allegations were the subject of a special motion to strike filed on behalf of Your Petitioner on the grounds that said allegations were improper and irrelevant conclusions of law, and that any such inquiry into said facts insofar as parents eligible under the Act are concerned, violates their constitutional rights.

WHEREFORE, Your Petitioner respectfully moves the three judge Court to strike from its Order and Judgment the language quoted above in paragraph 2.

Henry T. Reath
for Duane, Morris & Heckscher
Attorneys for Intervenor Defendant, Crouter

MOTION OF JOSE DIAZ, ET AL. FOR AMENDED ORDER

(Title Omitted in Printing)

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1. The Order of the Court herein, dated July 21, 1972, contains the following language:

> "and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith,"

2. There is no evidence in the record to support the foregoing statement.

3. The Act does not direct or earmark the payment of any funds, directly or indirectly, to any schools, nonpublic or public.

WHEREFORE, defendants Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife, F. Carl Kretzmann and Katheryn L. Kretzmann, his wife, Arthur Harvey and Muriel Harvey, his wife, Daniel F. X. Powell and Anna T. Powell, his wife, and Seth W. Watson, Jr. and Anne P. Watson, his wife, respectfully pray the Court to

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enter an Order amending its said Order of July 21, 1972, so as to delete therefrom the aforestated language.

Respectfully submitted,

William Bentley Ball
Joseph G. Skelly
Ball & Skelly
127 State Street
Harrisburg, Pennsylvania
Attorneys for Intervener
Defendants

ORDER

(Title Omitted in Printing)

AND NOW, this 3rd day of August, 1972, it is ORDERED that the motion of the intervenor defendant Crouter to alter or amend the judgment under Rule 59(e) be and it hereby is DENIED.

For the Court:
Joseph S. Lord, III
Ch. J.

ORDER

(Title Omitted in Printing)

AND NOW, this 4th day of August, 1972, it is ORDERED that the motion of JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, and SETH W. WATSON, JR. and ANNE P. WATSON, his wife, to amend the order of July 21, 1972 be and it hereby is DENIED.

For the Court:
Joseph S. Lord, III
Ch. J.

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 22, 1973

Henry T. Reath, Esq.
Duane, Morris & Heckscher
1600 Land Title Bldg.
Philadelphia, Pa. 19110

RE: SLOAN v. LEMON No. 72-459;
CROUTER v. LEMON, No. 72-620

Dear Sir:

The Court today took the following action in the above cases:

> "In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument. These cases are to be argued immediately following consolidated cases Nos. 72-694, 72-753, 72-791 and 72-929."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable in No. 72-620.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By
(Mrs.) Helen K. Loughran
Assistant Clerk

Supreme Court of the United States

Nos. 72-459 and 72-620

Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, et al.,

Appellants,

v.

Alton J. Lemon, et al.; and

Henry E. Crouter,

Appellant,

v.

Alton J. Lemon, et al.

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Alton J. Lemon, et al.

APPEALS from the United States District Court for the Eastern District of Pennsylvania.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument and to be argued immediately following consolidated cases Nos. 72-694, 72-753, 72-791, and 72-929.

January 22, 1973

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